

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Promotion of Competitive Networks in Local )  
Telecommunications Markets )

WT Docket No. 99-217

Wireless Communications Association International, Inc. )  
Petition for Rulemaking to Amend Section 1.4000 of the )  
Commission's Rules to Preempt Restrictions on Subscriber )  
Premises Reception or Transmission Antennas Designed )  
To Provide Fixed Wireless Services )

Cellular Telecommunications Industry Association )  
Petition for Rule Making and Amendment of the )  
Commission's Rules to Preempt State and Local )  
Imposition of Discriminatory And/Or Excessive Taxes )  
and Assessments )

Implementation of the Local Competition Provisions in )  
the Telecommunications Act of 1996 )

CC Docket No. 96-98

Reply Comments of MCI WorldCom, Inc  
NOTICE OF INQUIRY

MCI WorldCom, Inc., ("MCI WorldCom") takes this opportunity to reply to comments submitted in the above-captioned docket.<sup>1</sup> Comments are clearly divided between carriers who

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<sup>1</sup>In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services; Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes, WT Docket No. 99-217; and Assessments Implementation of the Local Competition, (continued...)

maintain that municipalities are expanding both the scale and scope of their right-of-way management to the point that it threatens to become service regulation; and municipalities who maintain that the Commission is strictly precluded from preempting any municipal action that does not absolutely prohibit entry.<sup>2</sup>

Carriers spent considerable time documenting instances where municipalities have discriminated in favor of one (class) of carriers<sup>3</sup> and have implemented burdensome conditions for entry or expansion that go beyond reasonable right-of-way management practices.<sup>4</sup> Carriers propose a variety of remedies to redress these problems, including: preempting municipal practices that *prima facie* inhibit entry;<sup>5</sup> allow carriers to opt into the rights-of-way conditions municipalities impose on ILECs; mediate, but not rule, on disputes between carriers and municipalities;<sup>6</sup> adopt principles clarifying legitimate municipal right-of-way management

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<sup>1</sup>(...continued)

Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *MDU Right-of-Way NOI*, Released July 7, 1999.

<sup>2</sup>The Comments of the City of Chicago are a notable exception to the municipal position.

<sup>3</sup>Notice of Inquiry Comments of: United States Telephone Association (USTA) at 2; Triton PCS Holdings (Triton) at 6; Teligent at 9; Sprint at 5; RCN at 8; National Cable Television Association (NCTA) at 13; Media One at 10; McLeod at 6; Association for Local Telecommunications Services (ALTS); at 11; MCI WorldCom at 2; AT&T at 23.

<sup>4</sup>NOI Comments of MCI WorldCom at 5; ALTS at 17,21; AT&T at 9-13; CTSI at 12; Teligent at 8; RCN at 10,11; NCTA at 6; McLeod at 6; SBC at 6.

<sup>5</sup>NOI Comments of: MCI WorldCom at 6

<sup>6</sup>NOI Comments of: ALTs at 9.

practice;<sup>7</sup> and initiate a rulemaking to identify practices that would be nondiscriminatory.<sup>8</sup>

Municipalities do not dispute the possibility that their actions may be discriminatory, competitively non-neutral, or that the fees they charge for rights-of-way are unrelated to use. Rather, they first assert that Section 253(d) gives the Commission authority to preempt only actions found to be in violation of Section 253(a), not 253(b).<sup>9</sup> Consequently, they conclude, if municipalities were to engage in non-competitively neutral, discriminatory rights-of-way policies, the Courts, not the Commission, would be the proper agency to address the problem. They further maintain that municipal right-of-way policies do not absolutely prohibit competitive entry and therefore do not violate Section 253(a).<sup>10</sup>

MCI WorldCom limits its reply comments to addressing this point because this point is the lynchpin of arguments offered by municipalities. The municipalities offer an overly narrow reading of Section 253(a). Municipalities point to the entry of competitive local exchange companies (CLECs) in a number of markets as evidence that rights-of-way policies do not absolutely and unconditionally blockade entry. Under the municipalities' view, so long as there is one CLEC in a market, no matter how tenuous their financial viability, no local action could be construed as prohibiting entry.

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<sup>7</sup>NOI Comments of: ALTS at 8; AT&T at 3; Sprint at 7; CTSI at 14; NCTA at 5; Global Crossing at 10.

<sup>8</sup>NOI Comments of SBC at 14.

<sup>9</sup>NOI Comments of National Association of Counties, *et. al.*, at 33.

<sup>10</sup>*Id.*, at 5. The municipal position implicitly assumes that discrimination cannot be a barrier to entry.

However, Congress granted the Commission broad powers to preempt state or local right-of-way actions. Congress gave the Commission authority to preempt *any* local action that served to prohibit *any* entrant, (not just those willing to incur the discriminatory rental fees imposed by municipalities) from offering *any* service. Thus, the Commission is empowered to preempt municipal rights-of-way actions that discriminate, or are not competitively neutral, if those actions serve to prevent just one potential entrant from offering service, expanding into new services, or expanding existing services to new areas within the jurisdiction of the municipality. CLECs have provided the Commission with substantial evidence that discriminatory municipal actions have prevented them from these sorts of expansions.<sup>11</sup>

Having established that the discriminatory actions are preemptable under Section 252(a) does not mean that the Commission has authority to engage in blanket preemption without consideration of specific claims and conditions. Section 252(d) requires the Commission to proceed on actual preemptions under 252(a) on a case-by-case basis. However, the Commission may identify which types of conditions fall outside the legitimate purview of municipal right-of-way management. Municipalities that engage in such activities would therefore have the burden of proving their actions do not effectively prohibit the offering or expansion of a telecommunications service, if a carrier were to file a complaint.

Carriers uniformly support the recommendation that the Commission adopt national policy guidelines that distinguish between permitted and preemptable right-of-way actions. MCI

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<sup>11</sup>See e.g., NOI Comments of: MCI WorldCom at 3; PCIA at 5; Metricom at 4; CTSI at 9; Global Crossing at 6; GST Telecom at 12; McLeod at 2-7; MediaOne at 4; Level 3 Communications at 4; ICG at 6; GCI at 3-6; Cablevision Lightpath and Nextlink at 7; ALTS at 21; AT&T at 9;

WorldCom supports the list of preemptable actions offered by AT&T<sup>12</sup>, permitted actions suggested by Sprint,<sup>13</sup> and the policy guidelines suggested by ALTS.<sup>14</sup> By establishing, and then enforcing, national rights-of-way guidelines the Commission would reduce bargaining disputes and costs for both carriers and municipalities. The net result would be the filing of fewer preemption complaints, preserving the authority of legitimate local right-of-way management, and more rapid, more extensive, and more varied entry of telecommunications carriers at the local level.

Respectfully submitted,

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December 13, 1999

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<sup>12</sup>AT&T NOI Comments at 10-14.

<sup>13</sup>Sprint NOI Comments at 8.

<sup>14</sup>ALTS NOI Comments at Summary.

## STATEMENT OF VERIFICATION

I have read the foregoing and, to the best of my knowledge, information and belief, there is good ground to support it, and it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on December 13, 1999.

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